(34882)



IN THE

# Supreme Court of the United States

**October Term, 1955**

**No. [redacted] 30**

Kings County Clerk's Index No. 8700, Year 1951
In the Matter of the
Foreclosure of Tax Liens pursuant to Title D of Chapter 17 of the Administrative Code of The City of New York,
LIST OF DELINQUENT TAXES
Sections 10, 11, 12 and 13
Borough of Brooklyn, Action No. 4

| Serial No. | Section | Block | Lot |
|---|---|---|---|
| 887 | 12 | 3831 | 12 |

Queens County Clerk's Index No. 3000, Year 1950
In the Matter of the
Foreclosure of Tax Liens pursuant to Title D of Chapter 17 of the Administrative Code of The City of New York,
LIST OF DELINQUENT TAXES
Sections 1 and 2
Borough of Queens, Action No. 1

| Serial No. | Section | Block | Lot |
|---|---|---|---|
| 83 | 1 | 78 | 9 |

THE CITY OF NEW YORK,
*Appellee,*

GERALD D. NELSON, GERALDINE D. N. ACKER and GERTRUDE N. FITZPATRICK, as Successor Trustees under the Will of WILLIAM NELSON, deceased, and HELEN D. MOLLER,
*Appellants.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEY YORK

## MOTION TO DISMISS APPEAL

February 20, 1956.

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IN THE

# Supreme Court of the United States

**October Term, 1955**

**No. 686**

Kings County Clerk's Index No. 8700, Year 1951
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Foreclosure of Tax Liens pursuant to Title D of Chapter 17 of the Administrative Code of The City of New York,
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THE CITY OF NEW YORK,

*Appellee,*

GERALD D. NELSON, GERALDINE D. N. ACKER and GERTRUDE N. FITZPATRICK, as Successor Trustees under the Will of WILLIAM NELSON, deceased, and HELEN D. MOLLER,

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEY YORK

## MOTION TO DISMISS APPEAL

Appellee, The City of New York, in the above entitled cause moves to dismiss the appeal herein on the ground that the question presented by the appeal is so unsubstantial as not to need further argument.

## Statement

(References to Record are by Folio No.)

On May 20, 1950, The City of New York, the appellee herein, pursuant to Title D of Chapter 17 of the New York City Administrative Code, commenced a foreclosure action in rem against 294 tax delinquent properties located in Sections 1 and 2 of the Borough of Queens. Under Title D, the Treasurer of The City of New York could select the tax section to be foreclosed, but when that was done, all discretion was taken from him. He had no power to distinguish between improved and vacant properties, or large and small amounts of tax arrears. It was mandatory that he include in the List of Delinquent Taxes *all* parcels four or more years delinquent in the Section selected. The "45th Avenue Property" of the appellants, therefore, was included in such list since it was located in Section 1 and was tax delinquent for four or more years (R. 309-310).

On December 17, 1951, The City of New York, pursuant to the same statute, commenced a similar in rem action against 1704 parcels of tax delinquent properties located in Sections 10, 11, 12 and 13 of the Borough of Brooklyn. Properly included in the List of Delinquent Taxes was the "Powell Street Property" of the appellants since it was located in Section 12 and was tax delinquent for four or more years (R. 304-305).

In both in rem actions the City could not seek personal money judgments. The City duly complied with the in rem jurisdictional requirements as to the filing of the List of Delinquent Taxes, and the posting and publication of the Public Notice of Foreclosure (R. 306). The appellants admitted that with respect to each of their properties the City mailed a copy of the Public Notice of Foreclosure to the office maintained by them at "36 West 44th Street, New

York 18, N. Y." and that such notices were received by their duly authorized agent (R. 46, 47, 313).

The appellants failed to pay the delinquent tax liens prior to the last date fixed for payment and never interposed any answer in the separate foreclosure actions (R. 307 and 311). They were in complete default. Consequently, judgments of foreclosure dispensing with the necessity of a judicial sale and directing the conveyance of the fee title to the City were entered. The City became vested with title to the 45th Avenue and Powell Street properties on August 22, 1950, and May 19, 1952, respectively. The 45th Street property was subsequently sold in accordance with the New York City Charter at public auction to one John Balog. The City still retains title and is in possession of the Powell Street property (R. 308-312).

Although the City did prepare tax bills for the years 1950-51 and 1951-52 on the 45th Avenue property (R. 156, 161), both of these bills called attention to the tax arrears on the property. Two duplicate payments made by the appellants likewise were called to their attention by two notices advising them to investigate the matter and apply for a refund. These notices were received by appellants five months before the City had even started the in rem action against the Powell Street property and nine months before the City had acquired its title (R. 386-405). Thus, appellants were apprised by sufficient notice that something was wrong with the tax status of their properties.

The trustee-appellants, who were administering these properties as assets of a trust, not only failed to exercise ordinary business prudence in examining the tax bills, but were grossly negligent in never having made an independent tax search of their properties or audit of the accounts of their trusted bookkeeper (R. 336-344).

On March 16, 1954, the appellants moved to open their defaults in payment and pleading. The Court of first

instance denied the motions in all respects and pointed out that it was precluded under the statute as construed by the highest court of the State of New York from extending the time of the appellants to answer or make payment. It found that the City had fully complied with the statutory requirements and that the plight of the appellants was attributable to their misplaced confidence in their trusted bookkeeper and agent, who had concealed all notices received from the City in order to cover up his defalcations (R. 418-420).

The orders of the Court of first instance were affirmed by the Appellate Division of the New York Supreme Court (284 App. Div. 894) and subsequently by the New York Court of Appeals (309 N. Y. 94). The latter Court in its opinion stated that it was without power to afford relief and that relief could only be had through an act of the New York State Legislature.,

## POINT I

**The vesting of title in the City of New York of the two properties here involved presents no substantial federal question.**

The appellants concede the general constitutionality of Title D (Jurisdictional Statement, pp. 8-11) but assert that in view of the disparity between the amount of the delinquent tax liens and the equity of appellants, the use of Title D as a method of collecting tax delinquencies instead of Title A of the New York City Administrative Code was the capricious choice of a City Tax Official that deprived them of their properties without due process and without just compensation.

Although Title A provides for a method of collecting tax delinquencies substantially *in personam* in procedure, a delinquent tax payer obtains no vested right in such

methods of collection. Any change in the remedy or mode of procedure made by the Legislature divests the property owner of no vested right. *League* v. *Texas*, 184 U. S. 156 (1902).

When, in 1948, the Legislature of the State of New York enacted Title D, it provided in § D17-2.0 thereof that such method of collection was to be in addition to any other existing remedies and, further, that actions under Title A could be discontinued and new actions started under Title D. The Legislature intended to afford The City of New York a summary remedy unencumbered by the many intricacies of the mortgage foreclosure type of actions which had proved to be time-consuming, expensive and outmoded. The choice, therefore, of Title D instead of Title A by the Treasurer of The City of New York as a method of collecting arrears against appellants' properties in 1950 and 1951 was not capricious but a proper exercise of discretion by which it became mandatory to foreclose all parcels delinquent four or more years regardless of the amount of arrears. The appellants have no constitutional right to insist that the method which the City must adopt for collection is one which has hitherto proved ineffectual.

Although a tax enforcement statute conceivably could be unconstitutional on the grounds that it deprives persons of their property without due process or denies to them the equal protection of the laws, it certainly could not be attacked as invalid on the ground that it takes an equity "without compensation". By the very nature of the tax enforcement process, as distinct from condemnation, equities are barred and foreclosed.

Fundamentally, the right to redemption is exclusively a statutory right. It is a matter of legislative grace and the Courts may not enlarge the period of redemption when the Legislature had laid down a particular date on which all of the delinquent's rights should terminate.

*Keely* v. *Sanders*, 99 U. S. 441, 445-446 (1878);
*Bank of the State of Alabama* v. *Dalton*, 9 How. 522 (1850);
*Johnson* v. *Smith*, 297 N. Y. 165, 171 (1948);
*Levy* v. *Newman*, 130 N. Y. 11, 13, 14 (1891).

Drastic and harsh procedures for the collection of taxes have been held to constitute due process and have been so considered by both history and the Courts. These summary methods were in existence long before the adoption of the Constitution and are not affected thereby.

*Leigh* v. *Green*, 193 U. S. 79, 89-91 (1904);
*King* v. *Mullins*, 171 U. S. 404 (1898);
*Palmer* v. *McMahon*, 133 U. S. 660, 669-670 (1890) affirming *McMahon* v. *Palmer*, 102 N. Y. 176 (1886);
*State Railroad Tax Cases*, 92 U. S. 575, 614 (1875);
*Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 281-282 (1856);
*City of New York* (*801-815 E. New York Ave.*), 290 N. Y. 236, 241 (1943).

There is no constitutional principle that entitles appellants to be protected by the *in personam* type of procedure with judicial sale of their properties rather than by a conveyance of the fee title to The City of New York as a result of a procedure in rem. This is especially so where the delinquent taxpayer has defaulted in pleading and payment. Thus Title 3 of the New York State Tax Law, providing for in rem foreclosure with no distinction as to amount of arrears as compared with equities, and which is almost identical with the City's Title D has been held constitutional. *City of New Rochelle* v. *Echo Bay Waterfront Corp.*, 294 N. Y. 678 (1945), cert. den. 326 U. S. 720.

Any doubt cast upon the constitutionality of Title 3 of the New York State Tax Law by *Lynbrook Gardens*

v. *Ullman*, 291 N. Y. 472 (1943), as suggested by the appellants (Jurisdictional Statement, p. 12) was laid to rest by the subsequent decision in *City of New Rochelle* v. *Echo Bay Waterfront Corp, supra*, where the judgment, as in the present case, directed an absolute conveyance to the City. Upon a subsequent motion in the New York Court of Appeals to amend the remittitur the motion was granted with the following memorandum (294 N. Y. 721):

> "The appellant contended that the notice given of the commencement of this action was not adequate as due process of law under the 14th Amendment of the Constitution of the United States. The appellant also contended that the judgment entered in this case deprived the appellant of its property without due process of law and appropriated its property to public use without just compensation in violation of the 14th Amendment of the Constitution of the United States. This Court held that the rights of the appellant under the 14th Amendment of the Constitution of the United States had not been violated or denied."

Subsequently certiorari was denied by this Court (326 U. S. 720).

This Court in *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526 (1895), held constitutional the in rem foreclosure statute of the State of Minnesota which is "strikingly similar to that set forth in Title 3" (*New Rochelle* opinion, 268 App. Div. 182, 186).

There is nothing in the Constitution which requires the Legislature of the State of New York in prescribing the rules of tax collection to adopt those which would be advantageous to a defaulting taxpayer, for it is well settled that the Legislature is the sole judge in determining what steps are to be followed in the collection of taxes. Such function is administrative and remains such even though judicial forms are employed in the process. If a judicial

agency is used for some part of the process, it is not because required, but convenient. It may be dispensed with. It is entirely for the Legislature to determine whether there should be seizure and sale, outright forfeiture, garnishment of debt, fine and imprisonment, foreclosure, civil suit or other summary method of tax enforcement.

*Phillips* v. *Commissioner*, 283 U. S. 589 (1931);
*Palmer* v. *McMahon, supra*, 133 U. S. 660;
*McMillen* v. *Anderson*, 95 U. S. 37 (1877);
*Town of Amherst* v. *County of Erie*, 260 N. Y. 361, 370 (1933);
*Protestant Episcopal Public Schools* v. *Davis*, 31 N. Y. 574 (1864).

This Court has repeatedly held that no person is deprived of due process of law under a statute which provides for assessment with notice and subsequent collection without notice.

*Ballard* v. *Hunter*, 204 U. S. 241, 254-255 (1907);
*Winona & St. Peter Land Co.* v. *Minnesota, supra*, 159 U. S. 526;
*Palmer* v. *McMahon, supra*, 133 U. S. 660;
*Spencer* v. *Merchant*, 125 U. S. 345, 355-356 (1888);
*Hagar* v. *Reclamation District*, 111 U. S. 701 (1884);
*McMillen* v. *Anderson, supra*, 95 U. S. 37.

In the *801-815 E. New York Ave.* case, *supra*, the New York Court of Appeals, after citing the provisions of the New York City Charter affording the taxpayer notice and an opportunity to be heard at some stage before the assessment becomes final, summarized the rule as follows (290 N. Y., at p. 241):

> "Once a taxpayer has been thus protected, the due process clauses are not offended by summary statu-

tory remedies for collection of ordinary taxes (3 Cooley on Taxation [4th ed.] § 1113). 'The collection of such taxes, after they are assessed, is a purely administrative act. No constitutional right of the taxpayer is invaded when the assessment is collected by forcible process, anyn ore than when a judgment is forcibly collected'. (Gray, Limitations of the Taxing Power, p. 581)".

Appellants have not been deprived of due process. Not only were they given due notice of the assessment and levy of the tax, sufficient of itself to satisfy the constitutional guaranty, but they admittedly received the public notice of foreclosure required by Title D.

## POINT II

**The appeal should be dismissed, with costs.**

February 20, 1956.

Respectfully submitted,

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